

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CONSERVATION FORCE
3240 S. I-10 Service Rd. W, Suite 200
Metairie, LA 70001

Plaintiff,

v.

KEN SALAZAR, Secretary of the U.S.
Department of the Interior, in his official
capacity; UNITED STATES
DEPARTMENT OF THE INTERIOR;
DANIEL M. ASHE, Director of the U.S.
Fish and Wildlife Service, in his official
capacity; UNITED STATES FISH AND
WILDLIFE SERVICE; HILARY
TOMPKINS, Solicitor for the U.S.
Department of the Interior; and the OFFICE
OF THE SOLICITOR,
1849 C Street NW
Washington, D.C. 20240

Defendants.

**COMPLAINT FOR FOIA VIOLATIONS
REGARDING CANADIAN WOOD BISON
TROPHY IMPORT PERMIT
APPLICATIONS AND DECISIONS
SINCE 2000**

I. INTRODUCTION

1. Ken Salazar, U.S. Secretary of the Interior; the U.S. Department of the Interior (“DOI”); Dan Ashe, Director of the United States Fish and Wildlife Service; the United States Fish and Wildlife Service (“FWS”); Hilary Tompkins, Solicitor of the United States Department of Interior; and the Office of the Solicitor (collectively, “Defendants”) have violated the Freedom of Information Act (FOIA), 5 U.S.C. § 552, et seq., by withholding from Plaintiff Conservation

Force agency records, dating from 2000 to the present, that pertain to all applications for import permits for Canadian wood bison trophies.

2. This lawsuit requests an order declaring that Defendants have violated FOIA, enjoining Defendants from further delay in responding to Plaintiff's April 16, 2012 FOIA request, and ordering Defendants to provide Plaintiff with the requested agency records being improperly withheld by a date certain.

3. This lawsuit is necessary because Defendants have failed to comply with the statutory time limits for responding to Plaintiff's FOIA request. While the FWS referred the request to the Office of the Solicitor for the Department of Interior as of August 9, 2012, neither the FWS nor the Solicitor's office has provided the requested records or denied the request, in whole or in part. Despite Plaintiff's attempts on September 5, 2012 to contact Defendants regarding the status of their request, Defendants have not responded.

4. By failing to fully, timely, and lawfully respond to Plaintiff's FOIA request, Defendants have infringed Plaintiff's rights under FOIA and impaired Plaintiff's ability to carry out its organizational mission.

II. JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) (FOIA) and 28 U.S.C. § 1331 (federal question).

6. Venue in this Court is proper under 5 U.S.C. § 552(a)(4)(B).

7. Because Defendants have failed to make a lawful determination within twenty (20) days of receiving Plaintiff's April 16, 2012 FOIA request, Plaintiff is deemed to have exhausted its administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i).

8. The FOIA claims made in this Complaint are ripe for judicial review, and Plaintiff's harms can be remedied by an order of this Court.

III. PARTIES

9. Plaintiff CONSERVATION FORCE is a non-profit 501(c)(3) foundation formed for the purpose of wildlife conservation, related education and wildlife research. Conservation Force is comprised of both organizational and individual members, all of whom are dedicated to the recovery of threatened and endangered species, including the Canadian wood bison, primarily through sustainable-use conservation programs. Its leaders and officers have been participants in the Convention on International Trade of Endangered Species of Wild Fauna and Flora (CITES) and the Endangered Species Act (ESA) process since their inception. Conservation Force is committed to and is directly participating in the conservation of wood bison in Canada. Most of its supporting organizations are committed to wood bison conservation and proper implementation of the ESA and CITES, and many of these organizations have invested heavily in wood bison conservation. Its officers pioneered the U.S. importation of Canadian wood bison trophies that has been one of the principle incentives and sources of funding for wood bison management and conservation in the Canadian Yukon. It has assisted a number of import permit applicants with their permit applications. Conservation Force has an organizational interest in the management of wildlife and the issuance of import permits for specimen of threatened and endangered species when appropriate. Conservation Force uses FOIA as an important means of keeping informed of agency activities and is harmed when denied documents to which it is entitled. Conservation Force is a member of the media, with its leadership including members of the Outdoor Writers Association of America (OWAA) and the Professional Outdoor Media Association (POMA), and it produces regular publications that publicize activities of federal agencies, particularly the U.S. Fish and Wildlife Service.

Conservation Force intends to continue using FOIA to gather information for these purposes, furthering FOIA's stated purpose of promoting the active oversight of public agencies.

10. Defendant DANIEL ASHE is the Director of the United States Fish and Wildlife Service. He is responsible for the administration and implementation of the ESA and its implementing regulations, including the issuance of permits to import Canadian wood bison trophies. He is also responsible for ensuring that the FWS complies with FOIA in responding to FOIA requests submitted to the FWS. He is sued in his official capacity.

11. Defendant UNITED STATES FISH AND WILDLIFE SERVICE is a federal agency within the Department of Interior authorized and required by law to implement and enforce the ESA. The Service has been delegated authority by the Secretary of Interior to implement the ESA for the Canadian wood bison, including the processing and adjudication of import permit applications regarding endangered and threatened species. The FWS is also responsible for responding to FOIA requests submitted to it.

12. Defendant HILARY TOMPKINS is the Solicitor for the United States Department of the Interior. She is responsible for directing and supervising the performance of all legal services for the Department of the Interior (DOI) and its component agencies, including the FWS. She is the head of the Office of the Solicitor and is responsible for the supervision of its employees.

13. Defendant OFFICE OF THE SOLICITOR is a component agency of the U.S. Department of the Interior, to which Plaintiff's April 16, 2012 FOIA request has been "forward[ed] . . . for their review and direct release."

14. Defendant DEPARTMENT OF THE INTERIOR (DOI) is the Executive department of which the FWS and the Office of the Solicitor are components.

15. Defendant KEN SALAZAR, UNITED STATES SECRETARY OF THE INTERIOR, is the highest ranking official within the Department of the Interior. In that capacity, he has ultimate responsibility for ensuring that the DOI and its components comply with the requirements of FOIA. He is sued in his official capacity.

16. Defendants' violation of FOIA has denied Plaintiff's access to information contained in agency records to which Plaintiff is entitled under FOIA. Without this information, Conservation Force cannot provide itself, its members, or the general public with information about Defendants' activities regarding the processing of Canadian wood bison trophy import permits, which are the subject of Plaintiff's FOIA request, nor can it effectively advocate for wildlife management and recovery through proper application of the Endangered Species Act and CITES, the key goal of Plaintiff Conservation Force. Thus, Plaintiff is injured in fact by Defendants' violations, and Plaintiff's injuries can be redressed by this suit.

IV. FACTS AND LAW

17. On November 26, 2000, Lawrence Masserant submitted, with the legal assistance of Plaintiff Conservation Force, an application for a permit to import his trophy of a wood bison taken in the Canadian Yukon in March of 2000. The application was assigned application number "PRT#MA037808-0."

18. On December 4, 2000, Father Russell Kohler submitted, with the legal assistance of Plaintiff Conservation Force, an application for a permit to import his trophy of a wood bison taken in the Canadian Yukon in March of 2000. The application was assigned application number "PRT#MA038081-0."

19. On October 6, 2002, Dr. John Salevurakis submitted, with the legal assistance of Plaintiff Conservation Force, an application for a permit to import his trophy of a wood bison

taken in the Canadian Yukon in February of 2002. The application was assigned application number “PRT#MA064687-0.”

20. On November 11, 2004, James Lee Brogan submitted, with the assistance of Plaintiff Conservation Force, an import permit application for a trophy of a wood bison taken in the Canadian Yukon in January 2004. The application was assigned application number “PRT#US096628-9.”

21. After between five and nine years of inaction by the FWS on their permit applications, despite repeated assurances that the permits would be issued, Mr. Brogan, Dr. Salevurakis, Father Kohler, and Mr. Masserant, along with Conservation Force and other interested parties, filed suit on March 13, 2009 to compel the unlawfully withheld permitting decisions and challenge other FWS conduct regarding the Canadian wood bison. After this suit, *Conservation Force v. Salazar*, No. 9-cv-0496 (D.D.C. 2009) (“*Wood Bison I*”) was filed, the FWS denied each of the applications at issue, and the permitting claims were dismissed as moot. *Wood Bison I*, 715 F. Supp. 2d 99, 105-08 (D.D.C. 2010).

22. On June 23, 2010 the *Wood Bison I* plaintiffs then filed a second suit challenging, among other things, the denial of the permits at issue in *Wood Bison I*, alleging violations of the Endangered Species Act (ESA) and the Administrative Procedures Act (APA). *Conservation Force v. Salazar*, No. 10-cv-1057 (D.D.C. 2010) (“*Wood Bison II*”).

23. On November 2, 2010, the FWS produced the initial Administrative Record in *Wood Bison II*, which was accompanied by a sworn declaration by Timothy Van Norman – Chief, Branch of Permits, FWS Office of Management Authority – which certified that “[d]ocuments related to the decisions on the import permit applications for wood bison that are at issue in this case are located in the Branch of Permits,” and that “the documents identified in the index to the

Administrative Record that accompanies this certification comprise a full and complete Administrative Record.” *Wood Bison II*, Dkt. No. 23-12, pg. 3, ¶¶ 3, 5. This sworn declaration does not assert that the Administrative Record comprises all FWS or other agency records regarding the import permit applications.

24. After amending the Administrative Record twice, on November 8, 2010 the FWS submitted a final index of the documents included in the *Wood Bison II* Administrative Record. See *Wood Bison II*, Dkt. No. 25-4. This index indicates that the FWS withheld eight documents from the Administrative Record on the basis of privilege:

- i) A June 3, 2009 “Email and Draft Document” from S. Finley to “FWS DMA Officials.”
- ii) A June 24, 2009 “Correspondence” from T. Van Norman to S. Finley.
- iii) A June 25, 2009 “Correspondence” from S. Finley to R. Gabel, R. Gnam, and T. Van Norman.
- iv) An August 4, 2009 “Correspondence” from S. Finley to T. Van Norman.
- v) An August 11, 2009 “Correspondence” from S. Finley to T. Van Norman.
- vi) An August 12, 2009 “Correspondence” from T. Van Norman to M. Carpenter.
- vii) An August 12, 2009 “Correspondence” from M. Carpenter to T. Van Norman.
- viii) An August 13, 2009 “Correspondence” from S. Finley to T. Van Norman.

25. The *Wood Bison II* Administrative Record index also indicates that three documents included in the Administrative Record were redacted to exclude “irrelevant information”:

- i) A September 9, 2008 “Correspondence” from M. Carpenter to T. Van Norman, designated AR No. 27.

ii) A June 2, 2009 “Correspondence” from R. Gabel to T. Seiko, designated AR No. 37.

iii) An August 13, 2009 “Correspondence” from M. Carpenter to T. Van Norman, designated AR. No. 43.

26. Ultimately, this Court granted summary judgment in favor of the *Wood Bison II* plaintiffs on their permitting claims, setting aside the denial of the import permit applications and remanding them to the FWS for decisions and explanations consistent with the APA. *Wood Bison II*, 2012 U.S. Dist. LEXIS 44297, *39 (March 30, 2012). In its opinion, the Court found generally that:

The administrative record does not reflect "disagreements between experts," and certainly does not contain a "vigorous debate" regarding "complicated scientific and policy matters" as propounded by Defendants. On the contrary, it reflects a consensus among expert scientists that the permits should be granted. The only apparent disagreement arose when a lawyer, "Attorney-Advisor Shawn Finley" was introduced into the mix. It is apparent from the turn of events that Attorney Finley pushed for denial of the permits (despite all scientific evidence in favor of granting them), yet Defendants have failed to offer any information or explanation regarding Attorney Finley[s] position, reasoning, or rationale. . . . All substantive information regarding Attorney Finley's position has been redacted from the record under the guise of the attorney-client privilege.

Id. at *12-13 (internal citations omitted). Notably, the Court never determined whether the withheld documents were truly privileged because the plaintiffs “waived [their] right to challenge that assertion [of privilege]” by electing not to file a Motion to Supplement the Administrative Record for the limited purpose of that case and at that time to avoid any further delay in those proceedings. *See Id.* at *27.

27. The FWS has received at least one other application for a permit to import a Canadian wood bison trophy since 2000. On July 1, 2005, the FWS published in the Federal Register a notice that it had received an application, which it designated “PRT-103917,” from

Arrowhead Bluffs, Inc. for “a permit to import the sport-hunted trophy of one male wood bison (*bison bison athabasca*) taken in Canada, for the purpose of enhancement of the survival of the species.” 70 Fed. Reg. 38190.

28. This suit challenges Defendants’ actions regarding a FOIA request made by or on behalf of Plaintiff Conservation Force.

29. On April 16, 2012 Conservation Force, through its attorney John J. Jackson, III, submitted to the FWS a FOIA request (“April 16 request”) via electronic mail (“e-mail”) requesting “any and all documents, correspondence, and notes of meetings between the Fish and Wildlife Service and the Office of the Solicitor regarding import permits for Canadian wood bison trophies since 2000.” The April 16 request further stated that it included “any documents excluded as purportedly ‘privileged’ from the administrative record in [*Wood Bison II*],” and listed the documents described in paragraph 22 of this Complaint. The request also stated that it “includes, but is not limited to, notes from any meeting regarding wood bison permits, especially the meeting of August 13, 2009.”

30. Plaintiff’s request was sent to the Fish and Wildlife Service FOIA e-mail address, R9FOIA@fws.gov.

31. On April 17, 2012 Plaintiff Conservation Force received an e-mail from E. Ray McLaughlin, Alternate FOIA Officer for the FWS, acknowledging receipt of the April 16 request and stating that it had been assigned the tracking number “FWS-2012-00734.”

32. Subsequently, Plaintiff received a letter from the FWS, dated August 9, 2012 (“August 9 letter”), the body of which states:

This is the Division of Management Authority’s final response to your Freedom of Information Act (FOIA) request received April 19, 2012, for “*all documents, correspondence, and notes of meetings between the fish [sic] and Wildlife Service and the Office of the Solicitor regarding import permits for Canadian wood bison*”

trophy since 2000. This includes any documents excluded as purportedly 'privileged' from the administrative record in Conservation Force v. Salazar, Case No. 1:10-cv-01057-JDB.."

Your request has been forward [sic] to the Department of Interior's Solicitor Office for their review and direct release of your FOIA request. You may contact Lance Purvis (Acting), MS-6429 MIB, 1849 C Street, NW, Washington, DC 20240, concerning your FOIA request. **This completes our response.**

If you have any questions, please contact Ms. Brenda Tapia, Division of Management Authority, 4401 North Fairfax Drive, Room 212, Arlington, Virginia 22203 (703-358-1989 or via e-mail at Brenda_Tapia@fws.gov).

33. The typed signature on the August 9 letter is "Timothy Van Norman, Chief, Branch of Permits, Division of Management Authority," but the hand-written signature appears to be that of "Michael Carpenter."

34. Because the DOI Solicitor's Office is part of the Department of Interior, 43 C.F.R. § 2.22(a) provides that consultation with or referral of April 16 request to the Solicitor's Office did not restart or otherwise affect the statutory time limit for responding to the April 16 request.

35. Despite Plaintiffs' attempts to contact the two individuals named in the August 9 letter, Brenda Tapia and Lance Purvis, both by e-mail and telephone on September 5, 2012, Plaintiff has not received any further response or correspondence regarding the April 16 request from the FWS, the Solicitor's Office, or any other party.

36. To date, Defendants have not denied the April 16 request, provided the requested records, or notified Plaintiff of any extension of the statutory time limit. It has now been 114 days – excluding Saturdays, Sundays, and legal public holidays – since April 19, 2012, the date the Division of Management Authority received the April 16 request, and 35 days – excluding Saturdays, Sundays, and legal public holidays – since the FWS sent the August 9 letter giving notice that Plaintiff's request had been "forwarded" to the Solicitor's Office.

37. Defendants have failed to comply with the FOIA requirement of making a determination on Plaintiff's April 16 request within twenty (20) days after receiving said request.

38. Defendants have neither sought to narrow the request nor identified unusual circumstances that might require an extension of time, pursuant to 5 U.S.C. § 552(a)(6)(B).

39. The specific challenges brought in this lawsuit seek to remedy ongoing efforts of Defendants to avoid full and timely compliance with Conservation Force's legally-protected attempts through formal and informal means, including FOIA requests, to gain information about the FWS's processing of any and all Canadian wood bison trophy import applications from 2000 to the present, as well as the involvement of the DOI Solicitor's Office in the processing of such permits. Conservation Force's FOIA request fully complied with the requirements of FOIA.

40. Plaintiff Conservation Force has brought this suit seeking court orders compelling timely and lawful compliance with the April 16 request.

41. Conservation Force intends to continue its use of FOIA to access agency records in the possession of Defendants. One of the purposes of FOIA is to promote the active oversight role of public advocacy groups. Conservation Force uses FOIA to publicize activities of federal agencies and to educate the public on a variety of conservation-related topics, including management of threatened and endangered species and the use of international sustainable-use conservation programs. Declaratory and injunctive relief is necessary to protect Conservation Force's continued oversight and advocacy through the well-established practice of scrutinizing agency records, which Congress intended to promote through the adoption of FOIA.

V. CLAIM FOR RELIEF

Defendants have failed to timely respond to Plaintiff's April 16, 2011 FOIA request within the statutorily prescribed twenty (20) working days.

42. Plaintiff repeats and incorporates by reference the facts and allegations set forth above as though fully set forth here.

43. On April 16, 2012, Plaintiff submitted a FOIA request pursuant to 5 U.S.C. § 552(a)(3)(A) and in compliance with the requirements thereof.

44. Defendants had “receipt” of Plaintiff’s April 16 FOIA request within the meaning of 5 U.S.C. § 552(a)(6)(A)(i) no later than April 19, 2012.

45. Defendants have violated FOIA, 5 U.S.C. § 552(a)(6)(A)(i), by failing to timely and lawfully make a determination regarding Plaintiff’s October 20, 2011 FOIA request for agency records within the statutorily prescribed twenty (20) working days, or even within the maximum extended statutory time limitation of thirty (30) days, excluding Saturdays, Sundays, and public legal holidays.

46. Defendants continue to violate FOIA, 5 U.S.C. § 552, by failing to fulfill Plaintiff’s April 16, 2012 request for agency records.

VI. REQUEST FOR RELIEF

FOR THESE REASONS, Plaintiff respectfully requests that this Court enter judgment providing the following relief:

1. Declare that Defendants violated FOIA by failing to lawfully respond to Plaintiff’s April 16, 2012 request for agency records in accordance with the statutory deadline;
2. Declare that Defendants continue to violate FOIA by failing to lawfully respond to Plaintiff’s April 16, 2012 request;
3. Direct by injunction that Defendants immediately provide to Plaintiff the records described in Plaintiffs April 16, 2012 request, which may not lawfully be withheld.

4. Grant Plaintiff its costs of litigation, including reasonable attorneys' fees as provided by FOIA, 5 U.S.C. § 552(a)(4)(E).
5. Provide any other such relief that the Court may deem just and proper.

Respectfully submitted,



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